PERNAS TRADING SDN. BHD.

v.

SENALI CONSTRUCTION WORKS SDN. BHD. & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 23-441-86]
1 JUNE 1991

CIVIL PROCEDURE: *Garnishment proceedings - Notice to show cause - Order nisi made absolute - Appeal - Whether garnishee should give evidence first - Burden of proof - Right to recall a witness - Exception - Rules of the High Court 1980, O. 49 rr. 1(1), 5, Form 101.*

The judgment creditor applied for a notice to show cause which was issued to the garnishee to show cause why it should not pay the judgment debtor. The Registrar made an order nisi absolute and the garnishee now appeals from the order, contending that the learned Registrar was wrong:

(a) in ruling after hearing arguments that the garnishee should begin to give evidence first, thereby treating the garnishee as plaintiff contrary to O. 49 r. 5 of Rules of the High Court 1980 (RHC) and Form 101 annexed thereto;

(b) in refusing an application by the garnishee to recall a witness, who had testified earlier, to adduce further evidence.

Held:

[1] Form 101 of the RHC is only a guide and should always be subject to any variation as may be required by circumstances.

[2] As garnishee proceedings are also attachment proceedings also, the garnishee is in the same position as the claimant/objector and the burden shifts to a garnishee to show cause that they did not owe any money at the time of the service of the order to show cause.

[3] The Court should never exercise its discretion to recall a witness when such an application is made by a person after closing his case, after his final submissions or after final submissions of both parties. The only exception is when the applicant is taken by surprise by some evidence of the opposing side - in this case there was no such surprise by the opposing side. Further, the garnishee's application on the last date, which was a date presumably meant for judgment, would not have commended itself to a reasonable Registrar.

[4] The retention sum which was retained by the bank out of money payable to the garnishee, was held by the bank as trustee for the garnishee who must have held the same, except for 4% (which was the garnishee's share), for the judgment debtor.

[Garnishee's appeal dismissed as indebtedness by the garnishee to the judgment debtor was not disproved.]

Cases referred to:

Bigsby v. Dickinson [1976] 4 Ch D 24
Ladd v. Marshall [1954] 1 WLR 1489
Ong Yoke Eng v. Lim Ah Yew [1982] 1 MLJ 226
Yah bt. Aji v. Fatimah bt. Hj. Mohd. Ariffin [1969] 2 MLJ 186

Legislation referred to:
Evidence Act 1950, s. 102
Rules of the High Court 1980, O. 49 rr. 1(1), 5
Stamp Act 1949, ss. 47A, 53

For the judgment creditor - Lalchand Nathermal; M/s. Lalchand, Nawawi, Phang & Co.
For the garnishee - Moganasundram; M/s. Yeoh Kian Teik & Co.

JUDGMENT

Peh Swee Chin J:

It was an appeal by the garnishee before me from an order of the learned Registrar making the order *nisi* (that is, notice to the garnishee to show cause) absolute in the sum of RM160,407.77, that is, the judgment sum obtained by the judgment creditor against the judgment debtors. I subsequently dismissed the said appeal with costs and now I give my grounds of judgment, by first of all setting out a brief history of the matter leading to the said appeal.

On the application of the judgment creditor, a notice to show cause was issued on 20 July 1987 to the garnishee abovenamed to show cause why it should not pay the judgment creditor the debt due from the garnishee to the 1st judgment debtor, that is, Seenli Construction Works Sdn. Bhd. (hereafter called the judgment debtor).

When the said notice to show cause came up before me, the garnishee disputed liability to pay any money and I ordered that the dispute be tried by the learned Registrar.

The matter was heard before the learned Registrar, who eventually made the order *nisi* (that is, notice to show cause) absolute, ordering the garnishee to pay the said sum of RM160,407.77 and costs. The garnishee appealed.

Before me, the garnishee took the first point that the learned Registrar was wrong in ruling after hearing arguments that the garnishee should begin to give evidence first, thereby treating the garnishee as plaintiff contrary to O. 49 r. 5 of the Rules of the High Court and Form 101 annexed thereto:

> Order 49 r. 1(1) refers to ... anyone within the jurisdiction (in this order referred to as the "garnishee") is **indebted to the judgment debtors,** the Court may ... order the garnishee to pay the judgment creditor ..., (the emphasis is mine).

Order 49 r. 5 refers further to the power of the Judge to order the liability of the garnishee to be tried before the learned Registrar without the need for any consent by the parties. The order for the liability to be tried by the learned Registrar was therefore not contrary to O. 49 r. 5.

The real complaint would seem to lie in the said Form 101 which would seem to the garnishee to be authority for saying that that judgment creditor should begin its evidence first. Form 101 is set out below:

> O. 49 r. 5. Dispute of liability by garnishee.
>
> 5. Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 101 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without, if it orders trial before the Registrar, the need for any consent by the parties.

No. 101

Order for Issue between Judgment Creditor and Garnishee

(Title as in Form 98)

Upon reading the affidavit of ... filed the ... day of ... 19 .. and the order nisi herein, dated the ... day of ... 19 .. and upon hearing Counsel for the judgment creditor, the garnishee and the judgment debtor.

It is ordered that the judgment creditor and the garnishee proceed to the trial of and issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be defendant, and that the question to be tried shall be whether there was any debt due or accruing due in any and what amount from the judgment debtor to the said garnishee at the time the said order nisi was served. And it is further ordered that the question of costs and all further questions be reserved to the Judge (or Registrar) trying the same issue.

Dated the ... day of ..., 19 ..

(Seal)

...
Registrar

At first sight, immediately the Form 101 would seem to be wrong and it is in fact wrong when it says:

> and that the question to be tried should be whether there was any debt due or accruing due in any and which amount **from the judgment debtor** to **the garnishee** at the time the said order nisi was served. (Emphasis is mine).

The error is glaring, be it a printing one or otherwise and it would not be wise to rely on it. In my view, any Form annexed to the Rules of the High Court is by way of a guideline and should always be subject to any variation as may be required by a great variety of expedient circumstances.

Garnishee proceedings are attachment proceedings also, though not in respect of chattels, but of debts. The order for garnishee to show cause that was obtained, though made *ex parte*, was based on some *prima facie* evidence. By analogy to proceedings of attachment of chattels, in a matter of who has to adduce evidence first, the garnishee is like a claimant/objector to the chattels attached. That this is right is reinforced by the nature or name of the order nisi, that is, the order for garnishee to show cause. The burden is shifted to a garnishee in showing cause to prove what he alleges, that he owed no money at the time of the service of the order to show cause. The right or the inconvenience of having to begin first is dependent on which party would fail if no evidence at all were given by either side. Please see s. 102 of Evidence Act.

The next point taken by the garnishee was that the learned Registrar should have considered a letter (Exhibit A1) to encl. 38, being an affidavit of a director of the garnishee company filed before the hearing before the learned Registrar, containing an admission by the judgment debtor that it had no further claim against the garnishee; dated 20 July 1987, the same day when the order for garnishee to show cause was made by the Court. The point was neither here nor there, and it was a form of dispute of liability by the garnishee to pay the judgment sum in question, hence the liability was ordered to be tried. It could not have any possible effect of barring the judgment creditor from proceeding further to obtain an order absolute.

The third point of the garnishee was that the learned Registrar was wrong in refusing an application by the garnishee to recall a witness to adduce further evidence from a witness who had earlier given evidence for the garnishee before the closing of the garnishee's case. The most important factor to be borne in mind is that the said application was made on a date when it was meant presumably for judgment by the learned Registrar, after submission of both Counsel before the learned Registrar were over on a previous date. It must be disconcerting to the learned Registrar and the opposing Counsel and nevertheless, after hearing full argument relating to such application, the learned Registrar had eventually dismissed such application to recall a witness to adduce further or fresh evidence.

Before the application was made by the garnishee, the learned Registrar had earlier in the case heard submission from the learned Counsel for the judgment creditor that certain relevant receipts issued purportedly by the judgment debtor to the garnishee, (50 of these receipts being marked as "G5" collectively) so as to attempt to show payment in full by the garnishee to the judgment debtor were not genuine, that is, those receipts issued prior to 25 October 1986. The reason for Counsel's submission was, according to him, because the stamps that were used on those receipts were not yet issued by the postal authority on those dates of the receipts on which they were used, as proved by an affidavit of Din bin Hussain, Senior Assistant Director of Posts, Perak filed before the hearing before the learned Registrar, and by the subsequent oral evidence of the same deponent at the hearing when the said Din bin Hussain was subjected to cross-examination by learned Counsel for the garnishee.

The stamps in question were 10-cent stamps distinguished from other 10-cent stamps by a picture of some plants and bunches of tiny fruit with the descriptive words *inter alia*: - "Lada Hitam" meaning "black pepper" and "Piper Nigrum", presumably a botanical name for black pepper. According to Encik Din bin Hussain, the distinctive stamps were first issued on 25 October 1986 and could only be used by members of the public on and from 25 October 1986 and not before. Such evidence was cogent and such submission that the receipts bearing the stamps and the dates prior to 25 October 1986 were not genuine, was equally difficult to assail.

Further if the garnishee had wanted to give further evidence that the receipts were genuine, the irresistible inference against this was that the stamps were at least affixed on the receipts on and after 25 October 1986 and therefore not on the dates on the receipts that were purportedly issued, but after such date of 25 October 1986 and more probably they were written and issued in order to evade payment to the judgment debtor after the service on the garnishee of notice to show cause. It is to be borne in mind that for an order nisi to be made absolute against the garnishee, the relevant time must be such indebtedness at the time of service of the notice to show cause on the garnishee on which it was served on 24 July 1987. Please see the case of *Lee Kam Chun, infra*.

What happened if the learned Registrar was wrong in refusing the application to recall and that if that witness was recalled, he would have said that the receipts were stamped with those new stamps on date or dates between 25 October 1986 (when the new stamps were issued to the public) and 24 July 1987, the date of service on the garnishee of the notice nisi and that such evidence was for the sake of academic argument bound to be acceptable to the learned Registrar?

Except for certain specified instruments, normally all unstamped or insufficiently stamped instruments may be stamped within 30 days after execution and if after the 30 days, they may be stamped with the payment of the deficient stamp duty plus 4 times the deficient duty or RM25 whatever is greater. The specified exceptions are bills of exchange, promissory

notes, or receipts of money or other property the amount or value of which exceeds RM20. Please see ss. 47 and 47A of the Stamp Ordinance 1949. By s. 53 no unstamped instrument shall be admitted in evidence unless it is executed by or on behalf of the Government, or unless it is to be used in criminal proceedings or unless it can be admitted in evidence on payment of the stamp duty and the penalty described above.

It is to be observed that the receipts in question did not come into one of these 3 categories in s. 53, and they must be stamped on or before the date or dates on which they were issued, or never and if they were so stamped, they would be inadmissible in evidence and to admit the same in evidence would be to nullify a prohibition imposed by a statute.

I now revert to the discretion exercised by the learned Registrar to find out if it was rightly or wrongly exercised in refusing further and fresh evidence after the parties' closing of their respective cases and all submissions.

It is settled law that parties in a civil case can only recall a witness subject to the discretion of the Court. In my view such discretion should never be exercised when it is made by the relevant applicant after the applicant has closed his case, a *fortiori* after he has made his final submission or after final submissions have been made by both parties save in only one exception which will be dealt with later. It would be idle then to talk of interests of justice for one side without speaking of justice to the other; when furthermore public interests require that there should be finality to litigation, and especially at the very late stage as in this case when the rules of trial would cease to be the hand-maiden and should become the mistress. It is not that such an applicant will be deprived of an opportunity to adduce evidence, for such evidence would have been easily available earlier and could have been easily adduced earlier. Thus the learned Registrar was quite right in following *Yah bt. Aji v. Fatimah bt. Hj. Mohd Ariffin* [1969] 2 MLJ 186 in which the learned Judge dismissed a similar application made by the defendant there after the close of his case, in relying on the principles in *Ladd v. Marshall* [1954] 1 WLR 1489, analogically of course, and apparently in not relying on *Ong Yoke Eng v. Lim Ah Yew* [1982] 1 MLJ 226. In the latter case, the plaintiff mentioned in her evidence she had a shop assistant but omitted to call the shop assistant. After the close of the case there and also after submissions, the plaintiff applied to call the shop assistant whom the plaintiff had apparently failed to call. That case concerning a fresh witness therefore appears to be on a different footing though the learned Judge there treated the application to call the new witness as a recalling of a witness, stating that surprise and prejudice to the other side should be guarded against. His Lordship held that the objection to the calling of the witness from the other side was an "objection on a question of fact" and was therefore "devoid of all merit". With the greatest respect, I am unable to agree that that was a good reason for allowing the application.

I refer to the only exception mentioned earlier and allowable on the facts of the instant case. It would be that the applicant was taken by surprise by some evidence of the opposing side, for example, that the opposing side had produced an account stated with an unqualified admission of liability signed by the applicant and the applicant had no knowledge, either to its existence or to its being raised potentially, especially in a trial without pleadings. There must be this kind of surprise, please see *Bigsby v. Dickinson* [1976] 4 Ch. D. 24 CA, on the principle relating to surprise. In the face of this sort of surprise, such evidence of rebuttal would be allowed by recalling a witness at the very late stage of the case as in this case.

What happened in the instant case was that the opposing side did not spring any surprise in the form of new evidence, for the applicant (garnishee) had notice in advance of the evidence of the postal officer, *viz*, the said Din bin Hussain in the form of his affidavit filed

before evidence *viva voce* was given before the learned Registrar and before whom, the said Din bin Hussain was cross-examined. His evidence could not conceivably be regarded as a surprise, that need of countering such evidence would have become immediately apparent on reading the said affidavit or hearing the evidence of the deponent at the hearing. No attempt was made until after the opposing Counsel in his final submission had stated that the receipts were not genuine. Such an application by the garnishee on a date meant most presumably for judgment would not have commended itself to any other reasonable Registrar who would not fail to regard it simply as a blatant attempt by the applicant to strengthen its own case after it was weakened somewhat by the submissions of the opposing Counsel.

Another point was raised, that is, that the decision of the learned Registrar was against the weight of evidence.

Inter alia, the learned Registrar had referred to the retention sum (as provided always in an ubiquitous retention clause in any building contract between an owner/employer and his building contractor for the purpose of remedying defects during the defects-liability period). The retention sum was retained by Bank Bumiputra Malaysia Bhd., out of money payable to the garnishee which was the bank's contractor. In turn the judgment debtor was the garnishee's contractor or sub-contractor. In *Lee Kam Chun v. Syarikat Kukuh Maju Sdn. Bhd. - Syarikat Perumahan Pegawai Kerajaan Sdn. Bhd.*, as garnishee [1988] 1 MLJ 444, the Court there held that such retention money was money of the contractor held in trust by the owner/employer for him.

In the evidence of the instant case, (please see p. 5 of the notes of evidence), the said bank held about RM183,517.50 as trustees for the garnishee who must have held the same, except for 4% of it, for the judgment debtor. In the said evidence, (please see p. 4 of it,) payment for work done in question was to be shared between the garnishee who was entitled to 4% and the judgment debtor, 96% of it. The said retention sum was held by the bank at the time of hearing before the learned Registrar, that is, long after the service on the garnishee of the order nisi, that is, notice to show cause.

The indebtedness by the garnishee to the judgment debtor was not disproved; for just to mention 3 only of those receipts on which the new stamps were used before their issue to the public having regard to the dates on the receipts, as explained above, the amounts mentioned therein totalled RM249,846.45 which was larger than the judgment sum of RM160,407.77 in question. The receipts were Nos. 1512, 1523 and 1505 for the respective sums of RM110,600; RM139,246.45 and RM80,000.

In the result, the order of the learned Registrar could be supported having regard to the evidence. I therefore dismissed the appeal from his order with costs.

Also found at [1991] 2 CLJ 1587